Supreme Court, U.S.
FILED
APR 4 1995
OFFICE OF THE CLERK

No. 94-1291

In the Supreme Court of the United States

OCTOBER TERM, 1994

DALE LYNN RYAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

RICHARD J. LAZARUS
Washington University School of Law
St. Louis, MO 63130
(314) 935-6495

F. THOMAS SCHORNHORST
Indiana University School of Law
Bloomington, IN 47405
(812) 855-9198

ANDREW L. FREY
LAWRENCE S. ROBBINS
Counsel of Record
KAY L. LACKEY*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

*ADMITTED IN MASSACHUSETTS ONLY

11 pp

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page(s)

Cases

Russell v. *United States*, 471 U.S. 858 (1985) 2-8

United States v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981) 2, 3

United States v. *Bass*, 404 U.S. 336 (1971) 8

United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981) 2, 3, 5, 8

United States v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979) 3

United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994) 7

United States v. *Stillwell*, 900 F.2d 1104 (7th Cir.), cert. denied, 498 U.S. 838 (1990) 7

Statutes

18 U.S.C. 844(i) . . . . . *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1291

DALE LYNN RYAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

The government rewrites the question presented in this case, doubtless to characterize the court of appeals' decision as a straightforward application of the "plain error" doctrine. But as the government elsewhere acknowledges (Br. 4), the court below did considerably more than simply find the absence of plain error: as a predicate to that determination, the majority (in this 6-5 en banc decision) first found that the fitness center was "used in an activity affecting interstate commerce," within the meaning of 18 U.S.C. 844(i). Only after satisfying itself that the fitness center fell within the ambit of Section 844(i) did the court of appeals turn to the question of plain error. And as its opinion makes clear, the majority would almost assuredly have decided the plain error inquiry *differently* had it concluded — as it should have — that there was *no* evidence showing that the fitness center was "used in an activity affecting interstate commerce" at the time of the fire.

As we explained in our petition (at 6-16), the court of appeals' contrary conclusion conflicts with decisions of two other circuits, is deeply mistaken, and presents an important and recurring question of federal criminal law. Moreover, as the government's opposition in this very case confirms, prosecutors may be expected to rely on the same expansive, and wrongheaded, construction of Section 844(i) in future cases. Unless and until this Court formally disapproves the government's "receipt of natural gas" theory — as the Court implicitly did in *Russell* v. *United States*, 471 U.S. 858 (1985) — the government will continue to urge it. That theory does significant violence to the plain meaning of the statutory text, and undermines conventional notions of federalism in the context of arson prosecutions.

1. Section 844(i) applies only to property that, at the time of the fire, was "used in an activity affecting interstate commerce." In concluding that the fitness center met that test, the court of appeals pointed, first and foremost, to the building's "continued receipt of natural gas" (Pet. App. 7a). As we noted in the petition (at 7-11), that conclusion conflicts with decisions of the Second and Tenth Circuits (although it is consistent with decisions of the Fourth and Seventh Circuits).

a. The government does not dispute that in *United States* v. *Mennuti*, 639 F.2d 107, 110 (1981), the Second Circuit expressly held that a building does not fall within Section 844(i) simply because "it receive[s] electric power and telephone service from companies engaged in or affecting commerce." The government contends, however, that *Mennuti* has been superseded by the Second Circuit's more recent decision in *United States* v. *Barton*, 647 F.2d 224, cert. denied, 454 U.S. 857 (1981) — which, according to the government, "relied in part on the fact that the buildings were heated by interstate fuel to find that Section 844(i)'s interstate commerce requirement was satisfied." Br. in Opp. 11.

The government misapprehends the decision in *Barton*. *Barton* held that certain buildings fell within Section 844(i) because they were engaged in "commercial activities" — chiefly, gambling operations — and those activities "affected interstate commerce." 647 F.2d at 232. In deciding whether the gambling affected interstate commerce, the court pointed to several factors, including "the fuel used to provide heat and light for the [gambling facilities]." *Ibid*. But the receipt of fuel was not *itself* the "activity" in which the building was being "used" at the time of the fire; rather, the building in *Barton* was being "used" for gambling, and the *gambling* affected interstate commerce in part because it made use of interstate fuel shipments.

The Eighth Circuit took a dramatically different view in this case. At the time of the fire, the fitness center was not being "used" in any "activities" at all. It was, as the dissenters noted, simply "cumbering the ground." Pet. App. 16a. By the Eighth Circuit's lights, however, that was of no moment so long as the property was being "used" in the "activity" of receiving natural gas. The Second Circuit expressly rejected that construction of the statute in *Mennuti*, and *Barton* is entirely consistent with that position. Indeed, the court of appeals in *Barton* distinguished *Mennuti* precisely because the buildings in *Mennuti* were engaged in no commercial activities at the time of the fire, despite the fact that they had "several interstate contacts involving financing, insurance, fueling, and use of building materials." 647 F.2d at 232 n.8.

b. The government also contends (Br. 11) that both the Second Circuit's decision in *Mennuti* and the Tenth Circuit's decision in *United States* v. *Monholland*, 607 F.2d 1311 (1979) — which likewise took a narrow view of Section 844(i) — have been overtaken by this Court's decision in *Russell*. The government suggests (Br. 6) that *Russell* supports the proposition that "[t]he receipt of natural gas is

sufficient to establish the requisite nexus to interstate commerce."

In fact, however, *Russell* does nothing of the sort. To the contrary, as we explained in the petition (at 10), although the government asserted its "natural gas" theory in its brief in *Russell*, and reiterated that theory at oral argument, the Court declined to adopt it. Instead, the decision in *Russell* requires a close examination of the activity constituting the basic function of the building, and of the relationship of that activity to interstate commerce. The Court sustained the conviction in *Russell* only after satisfying itself that the building was, in fact, being used in an activity affecting interstate commerce (there, rental sales) "at the time [the defendant] attempted to destroy it by fire." 471 U.S. at 862.

The government cannot meet the *Russell* standard in this case. At the time of the fire, the fitness center was being used in no activities at all, much less activities affecting interstate commerce. That, of course, is precisely why the government sought, and received, the instructions requiring the jury to focus, not on the *activities* of the building, but rather on such intransitive *characteristics* as "receipt of natural gas," "ownership by an out-of-state resident," and "potential marketability." None of those qualities constitutes an "activity" in any conventional sense.

2. Not only does the court of appeals' decision conflict with decisions of two other Circuits, it is also deeply flawed. None of the factors relied on by the court below — the receipt of natural gas, the "potential marketability" of the property, or the fact that the building was owned by an out-of-state resident and leased by him to an out-of-state shell corporation — comports with the statutory text. As we explained in the petition (at 11-13), those factors cannot plausibly be termed "activities" in which the building was being "used" at the time of the fire.

The government attempts to square the circle, but in the end it finds no support in the plain language of Section 844(i). True, Section 844(i) covers "any" activity in which the building is "used." Br. in Opp. 7-8. But it is quite an unnatural reading of the text to say, as the government does, that a building is "used" in the "activity" of receiving natural gas. As Chief Judge Arnold explained, under a more conventional construction of those terms "[t]he proper inquiry is into the function of the building itself, and then a determination of whether that function affects interstate commerce." Pet. App. 47a. See also *Mennuti*, 639 F.2d at 110.

Still odder is the suggestion that the "marketability" of the building — or, as the court of appeals elsewhere stated, its "potential reentrance as a functioning building" (Pet. App. 7a) — is an "activity" in which the building was being "used." "Marketability," of course, is not an "activity" at all; it is a characteristic of the property (as it is of *all* property). The government concedes as much, but argues that the court of appeals also "relied on the fact that petitioner and his father had actually taken steps to put the building up for sale." Br. 9. But that is utterly unavailing for two reasons. First and foremost, those "steps" were taken well before the fire took place; thus, they cannot constitute an "activity" in which the building was being used *at the time of the fire*, as *Russell* requires. See 471 U.S. at 862. Second and in any event, whatever initial "steps" petitioner or his father may have taken to sell the property were *revoked*, according to the government at trial, before the fire occurred. Indeed, the government argued in summation that petitioner did *not* attempt to sell the building precisely "because he knows what he's going to do with that club, and it's not sell it." XV Tr. 32.

Finally, the mere fact that the fitness center was owned by petitioner's father and leased by him to an out-of-state shell corporation is not an "activity" either; it is simply a

status.[1] The government contends that ownership is an "activity" whenever the building owned is "conduct[ing] a business." Br. 9-10. But that begs the question: here, the fitness center was *closed*, and permanently so, at the time of the fire. There was no "business" being "conducted" on the premises, and no business was planned for the future. In that circumstance, "ownership" is a status and nothing more.[2]

3. The government does not dispute that the question presented in this case is a recurring one; indeed, it cites several of the more recent cases addressing the issue. It denies, however, that the case presents important federalism concerns. In the government's view, "*Russell* makes clear * * * that Congress intended Section 844(i) to extend to the limit of its powers under the Commerce Clause" (Br. 10);

---

[1] The government contends that "[t]he building's out-of-state ownership * * * was not one of the factors on which the court of appeals relied in finding an effect on interstate commerce." Br. 9. That is not so. The court below expressly identified "the lease arrangement" as support for its conclusion that Section 844(i) applied. Pet. App. 7a. And "the lease arrangement," as the court of appeals had previously defined it, was a shorthand formulation for the fact that the "'building was owned by [petitioner's father] and leased by him to * * * a Kansas Corporation.'" Pet. App. 3a.

[2] The government cites two cases (Br. 8-9) that stand for the unremarkable proposition that "'property routinely used in interstate commerce activity does not lose its interstate characteristics because of a temporary cessation of that activity.'" But as we explained in the petition (at 14 n.7), in none of those cases was the building simply out of business, and permanently so, at the time of the fire. The government does not dispute that the Ryan Fitness Center was permanently closed at the time of the fire. Nor does it cite a single case — and, to our knowledge, there is no case besides this one — in which a court has held that a *permanently* closed business is nevertheless "used in an activity affecting interstate commerce."

and that assertion of congressional authority, the government adds, vitiates any federalism interests.

Again, the government misreads *Russell*. The Court expressly held in *Russell* that Section 844(i) "*only* applies to property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862 (emphasis added). True, the terms "affect commerce" express an intent to exercise the limit of congressional commerce power; but those terms come into play only after the government first proves that there was an "activity" in which the building was being "used." Absent such an "activity" in which the building is being "used," Section 844(i) simply does not apply.

In short, the federalism concerns simply will not go away — as the government's brief in opposition in this very case reveals. Like the Eighth Circuit, the government believes that the receipt of natural gas is sufficient to implicate Section 844(i). Like the Eighth Circuit, the government believes that such inherently passive characteristics as "marketability" and "ownership" constitute "activities" within the meaning of Section 844(i). And emboldened by its successes in the Seventh Circuit (*United States* v. *Stillwell*, 900 F.2d 1104, cert. denied, 498 U.S. 838 (1990)), the Fourth Circuit (*United States* v. *Ramey*, 24 F.3d 602 (4th Cir. 1994)), and now here -- and heedless of the conflicting Second and Tenth Circuit decisions -- the government may be expected to pursue those expansive theories in future prosecutions.

The implications are striking: on the government's view, every property — including private homes, mom-and-pop grocery stores, even cottages deep in the woods (see *United States* v. *Ramey*) — is covered by Section 844(i). There is no stopping point. Not only does that make hash of the statutory text — reading out of the statute the obvious terms of limitation, "activity" and "used" — but it also sweeps within the federal compass *all* arsons of *all* buildings. Prevailing

notions of federalism do not permit that result. To the contrary, precisely because "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," this Court has held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

The Second Circuit got it right in *Mennuti*: the mere receipt of natural gas — without some nexus to an "activity" in which the building is being "used" at the time of the fire — does not satisfy Section 844(i). The government's contrary view, which it could not sell in *Russell*, is reason enough to predict that the problem will not go away. Unless and until this Court dispositively rejects that extraordinary construction of the statute, the government may be expected to urge that theory in future prosecutions. In short order, there will be little left of the limiting principles in the statute — principles designed, in no small measure, to separate truly federal offenses from arsons more appropriately reserved for state prosecutors (who, in the present case, declined to pursue a case against petitioner, presumably for want of sufficient evidence).

4. Finally, the government suggests that petitioner's failure to object to the jury instructions "makes this case an unsuitable vehicle for examination of the reach of 18 U.S.C. 844(i)" (Br. 6). That is not so. As the government acknowledges (Br. 4), the court of appeals' plain error analysis turned on its initial conclusion that the fitness center fell within the ambit of Section 844(i). Absent that initial conclusion — which was wholly unaffected by the plain error posture of the case — it is highly unlikely that the court of appeals would have resolved the instructional issue as it did. Indeed, the government does not suggest that had the court of appeals found insufficient proof that the fitness center was "used in any activity affecting interstate commerce," it would

nevertheless have been free to sustain petitioner's conviction on plain error grounds.

Thus, the question presented is squarely posed, and a different resolution would almost assuredly alter the court of appeals' disposition of the plain error inquiry. There is no reason to await the next prosecution in which the government propounds the same untethered construction of Section 844(i).

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD J. LAZARUS
Washington University
School of Law
St. Louis, MO 63130
(314) 935-6495

F. THOMAS SCHORNHORST
Indiana University
School of Law
Bloomington, IN 47405
(812) 855-9198

ANDREW L. FREY
LAWRENCE S. ROBBINS
Counsel of Record
KAY L. LACKEY*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

APRIL 1995

*ADMITTED IN MASSACHUSETTS ONLY